

STATE OF MICHIGAN  
COURT OF APPEALS

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KENNETH PAGE, JR., Personal Representative of  
the Estates of KENNETH PAGE, SR., and  
CHARLENEA PAGE, and JANE EASELY,  
Personal Representative of the Estate of RUTHIE  
MAE LATHAN,

UNPUBLISHED  
January 4, 2005

Plaintiffs-Appellees,

v

No. 249224  
Wayne Circuit Court  
LC No. 01-100921-NI

BENJAMIN DALE BIDWELL,

Defendant-Appellee,

and

WAYNE COUNTY ROAD COMMISSION,

Defendant-Appellant.

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Before: Neff, P.J., and Cooper and R.S. Gribbs\*, JJ.

PER CURIAM.

Defendant Wayne County Road Commission appeals as on leave granted<sup>1</sup> the order denying its motion for summary disposition pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(8) in this wrongful death case.<sup>2</sup> Defendant contends that plaintiffs Kenneth Page, Jr. and Jane

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<sup>1</sup> This Court originally denied defendant's application for leave to appeal. *Page v Bidwell*, unpublished order of the Court of Appeals, entered May 31, 2002 (Docket No. 240456). In lieu of granting leave to appeal, the Michigan Supreme Court remanded to this Court as on leave granted, *Page v Bidwell*, 468 Mich 921; 664 NW2d 213 (2003), with the direction to consider *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143; 615 NW2d 702 (2000).

<sup>2</sup> Defendant actually filed two motions for summary disposition, the first based on governmental  
(continued...)

\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Easley, as personal representatives of the estates of the deceased, failed to plead a cause of action in avoidance of governmental immunity. Although the trial court erred in denying defendant's motion on several grounds, the trial court did properly deny defendant's motion based on a defect in the improved portion of the highway designed for vehicular travel, albeit for the wrong reasons.<sup>3</sup> Accordingly, we affirm in part, reverse in part and remand for further proceedings.

## I. Facts and Procedural History

Late in the afternoon on December 26, 1999, Benjamin Dale Bidwell was driving down Karr Road, a gravel and dirt county road in Sumpter Township. Mr. Bidwell swerved into the opposite lane to avoid a tree limb in the road and, due to potholes and ruts on the road's surface, lost control of his vehicle. Mr. Bidwell's vehicle hit a "berm"<sup>4</sup> on the side of the road and became airborne. The vehicle struck and flipped a van that was backing out of a nearby driveway, killing plaintiffs' decedents who were sitting inside.<sup>5</sup>

Following this fatal accident, plaintiffs filed separate, but nearly identical, complaints against Mr. Bidwell and the county. Plaintiffs alleged that defendant failed to design or redesign Karr Road in a safe manner; inspect the road for dangerous conditions; repair or correct the nonconforming width of the road, steep crowning in the center of the roadbed, potholes, and "berms"; set an appropriate speed limit; erect speed limit and hazard signs;<sup>6</sup> take reasonable precautions to protect motorists; and generally keep Karr Road in a condition that was safe and fit for public travel. Plaintiffs contended that these conditions constituted a nuisance per se.<sup>7</sup> In moving for summary disposition of these claims, defendant asserted that none of the alleged defects fell within the highway exception to governmental immunity. The trial court denied defendant's motion, finding that the totality of the defects or circumstances defeated defendant's claim of governmental immunity.

## II. Legal Analysis

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immunity and failure to state an actionable claim and the second only for failure to state an actionable claim. As the failure to state an actionable claim was based on plaintiffs' failure to plead in avoidance of governmental immunity, we will consider both subsections.

<sup>3</sup> *Liggett Restaurant Group, Inc v Pontiac*, 260 Mich App 127, 136-137; 676 NW2d 633 (2003).

<sup>4</sup> The berm in this case is actually a mound of dirt measuring six to twelve inches that is created when the road is graded. The berm sits on the side of the roadway next to the ditch and is supposed to assist water runoff, although it has the opposite effect.

<sup>5</sup> Mr. Bidwell was also seriously injured and has no recollection of the accident. A police officer dispatched to the scene determined that Mr. Bidwell was traveling at seventy miles per hour. However, an accident reconstructionist later determined that Mr. Bidwell's speed was between forty-two and forty-four miles per hour.

<sup>6</sup> In their brief on appeal, plaintiffs concede that their claims regarding the speed limit and inadequate signage on Karr Road are not within the highway exception to governmental immunity.

<sup>7</sup> Plaintiffs also concede that their nuisance claim was rendered moot by *Li v Feldt*, 439 Mich 457; 487 NW2d 127 (1992).

Defendant asserts that the trial court erred in denying its motion for summary disposition as plaintiffs failed to plead a cause of action within the highway exception in avoidance of governmental immunity. We review a trial court's determination regarding a motion for summary disposition de novo.<sup>8</sup> A motion under MCR 2.116(C)(7) "tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties."<sup>9</sup> In making this determination, well-pleaded allegations are accepted as true and construed in favor of the nonmoving party.<sup>10</sup> A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the pleadings alone and should be granted only if the factual development of the claim could not justify recovery.<sup>11</sup> The determination of whether a claim falls within the highway exception is a question of law which we also review de novo.<sup>12</sup>

Absent an exception, a governmental agency is immune from tort liability for injuries caused while the agency was engaged in a governmental function.<sup>13</sup> A governmental function is "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law."<sup>14</sup> The grant of governmental immunity is broad, and its exceptions are narrowly construed.<sup>15</sup> The highway exception to governmental immunity provides in relevant part:

[E]ach governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. The liability, procedure, and remedy as to county roads under the jurisdiction of a county road commission shall be provided in . . . MCL 224.21. The duty of the state and the county road commissions to repair and

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<sup>8</sup> *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

<sup>9</sup> *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003), quoting *Glancy v Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998).

<sup>10</sup> *Dampier v Wayne Co*, 233 Mich App 714, 720; 592 NW2d 809 (1999).

<sup>11</sup> *Beaudrie*, *supra* at 129-130.

<sup>12</sup> *Meek v Dep't of Transportation*, 240 Mich App 105, 110; 610 NW2d 250 (2000).

<sup>13</sup> MCL 691.1407(1); *Maskery*, *supra* at 613.

<sup>14</sup> *Carr v Lansing*, 259 Mich App 376, 379; 674 NW2d 168 (2003), quoting MCL 691.1401(f).

<sup>15</sup> *Nawrocki*, *supra* at 158.

maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks or any other installation outside of the improved portion of the highway designed for vehicular travel. . . .<sup>[16]</sup>

Pursuant to MCL 224.21, “A county shall keep in reasonable repair, so that they are reasonably safe and convenient for public travel, all county roads, bridges, and culverts that are within the county’s jurisdiction, are under its care and control, and are open to public travel.”<sup>17</sup> A road commission’s duty to keep a highway “reasonably safe and convenient for public travel” extends only to “the improved portion of the highway designed for vehicular travel,” *i.e.*, “the actual roadbed itself.”<sup>18</sup>

In denying defendant’s motion, the trial court applied a “totality of the circumstances test” and found that the “berms,” tree limb and failure to properly grade Karr Road resulting in a washboard effect *combined*, created a question of material fact in avoidance of governmental immunity. However, we agree with defendant that a “totality of the circumstances test” is in direct contravention of the Michigan Supreme Court’s mandate in *Nawrocki* that the exceptions to governmental immunity be construed narrowly. The trial court was required, as are we, to review each of the plaintiffs’ claims individually to determine if it falls within the highway exception. Nothing in the plain language of MCL 691.1402(1) indicates that any other review is proper. For the same reason, we must reject plaintiffs’ claim that defendant generally failed to maintain and repair Karr Road so that it is reasonably safe and convenient for public travel. Such a general claim, omitting reference to a specific breach of duty, is clearly too broad to fall within a narrow construction of the highway exception.

Furthermore, plaintiffs’ claim that defendant failed to design a safe roadway does not fall within the highway exception to governmental immunity. The Michigan Supreme Court made clear in *Hanson v Mecosta Co Rd Comm’rs*,<sup>19</sup> that a road commission does not have “a duty to design, or correct defects arising from the original design or construction of highways.”<sup>20</sup> MCL 691.1402(1) only requires a road commission to *maintain* the highway, meaning to keep it in reasonable repair.<sup>21</sup> Accordingly, we must reject plaintiffs’ design claim and find that the trial court should have partially granted defendants’ motion for summary disposition on this ground.

Although the trial court failed to properly review defendant’s motion and improperly denied defendant’s motion on some grounds, the trial court correctly determined that defendant was not entitled to summary disposition on all of plaintiffs’ claims. Plaintiffs did properly allege

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<sup>16</sup> MCL 691.1402(1).

<sup>17</sup> MCL 224.21(2).

<sup>18</sup> *Nawrocki*, *supra* at 171, 177.

<sup>19</sup> *Hanson v Mecosta Co Rd Comm’rs*, 465 Mich 492; 638 NW2d 396 (2002).

<sup>20</sup> *Id.* at 502.

<sup>21</sup> *Id.*

that defendant failed to repair and maintain Karr Road. Specifically, plaintiffs allege that defendant improperly graded the road, leaving its surface full of potholes and ruts and creating a dangerous washboard effect. Plaintiffs also contend that improper grading methods left dangerously high ridges of dirt, or “berms,” along the edge of the roadway. These “berms,” a by-product of improper maintenance, reduced the width of the roadbed to nearly fifteen feet.<sup>22</sup> As a result, two cars converging on one point could not safely pass each other. These improper grading methods also created a dangerously steep crown in the center of the roadbed. Furthermore, plaintiffs assert that defendant left a large tree limb in the road, blocking the entire northbound lane of traffic, for two months.

Each of these alleged defects are dangerous or defective conditions affecting the improved portion of the highway designed for vehicular travel caused by defendant’s failure to properly maintain Karr Road. As the ruts and potholes are part of the surface of the road, they clearly meet this definition. Plaintiffs presented evidence that the “berms” actually narrow Karr Road, impeding vehicles that converge on one point. Plaintiffs also presented evidence that the steep crown in the center of the road caused Mr. Bidwell to lose control and skid sideways into the “berm.” The “berms” and steep crown were not the result of an improper design. Plaintiffs presented the report of Duane Dunlap, an engineer, who investigated the condition of Karr Road. In Mr. Dunlap’s expert opinion, defendant used improper grading techniques on Karr Road, actually creating the dangerous “berms” and crown.

We further reject defendant’s contention that the tree limb blocking the northbound lane of travel is excluded from the definition of “highway.” Defendant relies on the definition of “highway” in MCL 691.1401(e), which indicates that the term does *not* include a tree. However, this is not a case in which a roadside tree obstructed the view of a motorist<sup>23</sup> or in which a passing motorist was injured by a falling branch.<sup>24</sup> Accordingly, *Nawrocki*’s warning that the Legislature “never contemplated or intended” lawsuits based upon tree limbs<sup>25</sup> is inapplicable under these circumstances. A tree limb lying in the roadway and blocking a lane of traffic is clearly a defect in the actual roadbed. The tree limb is akin to any other type of debris that causes a dangerous condition in the improved portion of a highway designed for vehicular travel, be it a lost fender or a sheet of plastic. Therefore, the trial court properly determined that this barrier fell within the highway exception to governmental immunity.

Once a plaintiff establishes that a defect falls within the highway exception, he or she is required to present evidence of causation and damages consistent with any negligence action.<sup>26</sup> Plaintiffs presented ample evidence that these defects in the roadway actually caused Mr.

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<sup>22</sup> Pursuant to statute, a county road must be four rods, or twenty feet, wide. MCL 224.11(1).

<sup>23</sup> See *Scheurman v Dep’t of Transportation*, 434 Mich 619; 456 NW2d 66 (1990).

<sup>24</sup> See *McKeen v Tisch (On Remand)*, 223 Mich App 721; 567 NW2d 487 (1997).

<sup>25</sup> *Nawrocki*, *supra* at 178 n 34.

<sup>26</sup> *Haliw v Sterling Hgts*, 464 Mich 297, 304; 627 NW2d 581 (2001), lv gtd following remand 470 Mich 869 (2004).

Bidwell to lose control of his vehicle and become airborne, resulting in the deaths of three individuals.<sup>27</sup> However, a road commission is only liable for a defect in the roadway if it was on notice pursuant to MCL 691.1403.

No governmental agency is liable for injuries or damages caused by defective highways unless the governmental agency knew, or in the exercise of reasonable diligence should have known, of the existence of the defect and had a reasonable time to repair the defect before the injury took place. Knowledge of the defect and time to repair the same shall be conclusively presumed when the defect existed so as to be readily apparent to an ordinarily observant person for a period of 30 days or longer before the injury took place.<sup>[28]</sup>

Plaintiffs presented the affidavit of Serena Hubbard, a local resident, as evidence of defendant's knowledge of the many dangerous conditions on Karr Road. Ms. Hubbard stated that she had complained to defendant on several occasions over the prior year about "hazardous road conditions." This affidavit is sufficient to create a question of material fact that defendant had actual notice of the dangerous condition of the roadway prior to the accident, including the potholes and ruts, the "berms" that narrowed the roadway and the steep crown that caused Mr. Bidwell to careen sideways.

Plaintiffs also presented ample evidence that defendant had both actual and constructive notice that a large tree limb was blocking the northbound lane of Karr Road. Monique Davis, who reported the accident, stated in a deposition that the tree limb had fallen in front of her home during an electrical storm in October. Another local resident stated in an affidavit that the limb had fallen sometime before Thanksgiving. Furthermore, Ms. Hubbard indicated that she complained to defendant about the tree limb one week before the accident. The tree limb was a significant barrier and dangerous condition on Karr Road which led to a fatal accident. As defendant had notice of this condition, the trial court properly found that plaintiffs pleaded in avoidance of governmental immunity on this ground. Accordingly, the trial court properly denied defendant's motion for summary disposition.

Affirmed in part, reversed in part and remanded for further proceedings as plaintiffs successfully pleaded in avoidance of governmental immunity on the ground that defendant had notice of several dangerous and defective conditions in the improved portion of the highway

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<sup>27</sup> The officer dispatched to the scene and all expert witnesses agreed that Mr. Bidwell swerved to avoid the tree limb, slid due to the washboard surface of the road and steep crown in the center of the road and hit the "berm", becoming airborne.

<sup>28</sup> MCL 691.1403.

designed for vehicular travel for which there is a sufficient nexus for the jury to determine causation. We do not retain jurisdiction.

/s/ Janet T. Neff  
/s/ Jessica R. Cooper  
/s/ Roman S. Gibbs